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OF

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COMPETITION BUREAU

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TABLE OF CONTENTS

Introduction

Let me begin by saying that I am glad to have this opportunity to address this conference on Competition Law and Competitive Business Practices presented by the Canadian Institute. I know the subject of amendments to the *Competition Act* is of particular interest to you and I would like to provide you with my views on the "state of play" in the amendments initiative.

In the summer of 1994, the Minister of Industry, the Hon. John Manley, asked me if I was satisfied with the *Act*. My view was that, for the most part, the *Act* was working well and the approach it represented was fundamentally sound. However, after nearly a decade of experience in applying the *Act* in its current form, there were some areas where improvements might be warranted.

The *Act* was last substantially amended in 1986, giving Canada a strong and effective law that has served Canadians well. However, developments such as the burgeoning growth of technology and the liberalization of the global trading environment in the rapidly evolving marketplace of the 1990s have had an impact on competition law enforcement. As one of the key framework business laws in Canada, we need to keep the legislation modern to respond to emerging business trends.

When we first considered the possibility of amendments, I wanted to approach the subject differently. In the past, amending the *Act* had proven to be a difficult and lengthy process. Of course, those amendments initiatives involved a major overhaul of the legislation. Accordingly, we sought ways to identify areas for amendment where we could develop a broad consensus, leading to a balanced package of amendments. This acted as our guiding principle for the consultation process.

Amending the *Act* is not easy. We want to break the pattern of only amending the *Act* once in a decade and always when doing so changes the model.

The Discussion Paper

On June 28, 1995, the Minister announced the commencement of a broad public consultation process to update the *Act*. In so doing, he indicated that there was:

> [a] need to make some adjustments to address the rapid pace of change in world markets. Our objective is a more effective competition law to help shape a more innovative economy in Canada.[1]

We distributed a discussion paper to over 1,000 interested parties and made it available on the Internet. It outlined the areas in which we preliminarily identified that amendments could be warranted and posed 60 questions on the direction amendments might take.

We received over 80 responses from interested stakeholders, including consumer associations, businesses, and members of the legal, law enforcement and academic communities.

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1 News Release, "Industry Minister Manley Announces Consultations on *Competition Act* Amendments", June 28, 1995.

The Consultative Panel

In light of the detailed and wide-ranging comments on the discussion paper, we initiated more specific consultations. Following the conclusion of the comment period, a Consultative Panel[2] was established to review the comments and give me more detailed advice on the suitability and feasibility of proposed areas for amendment.[3]

Panel members reflected a broad cross-section of stakeholder interests: manufacturers, consumers, large and small retailers, the legal community, academia and a provincial securities agency. We sought respected commentators and independent thinkers in the competition law area. In searching for pragmatic solutions to the problems we identified, members took a constructive approach to their deliberations. All undertook to consider options in broad public policy terms, rather than based on narrow or sectoral interests.

The Competition Bureau took an active role in presenting detailed proposals to Panel members, reflecting an analysis of issues and comments received. Members, in return, brought some of their own proposals to the table. Although the Panel was the principal forum for discussion of proposed changes to the law, the Bureau also continued to seek the views of other stakeholders.

Panel members' discussions led to probing on the exact nature of the problems identified; the debate of assumptions; the consideration of various alternative solutions; and an exploration of the boundaries of the solutions that would be acceptable to different stakeholder groups.

The Panel achieved consensus regarding amendments in practically all areas. The one exception related to aspects of confidentiality and international cooperation, where the business and some legal representatives took positions distinct from the remainder of Panel members.

Director's Comments on the Panel's Recommendations

I have carefully considered the Panel's Report. In my view, members produced a balanced set of recommendations in a fine example of public and private sector partnership in the development of public policy. The Report provides a proper basis for the government to move ahead with the amendments initiative.

The Panel's recommendations in the areas of pre-merger notifications, regular price claims and prohibition orders suggest significant and meaningful improvements in the law, while responding evenly to stakeholder concerns. Although it concluded it could not make detailed recommendations on the subject of deceptive telemarketing practices, the Panel nevertheless helped to advance the debate in this area. Its recommendations on access to the Competition Tribunal by private parties were constructive as well, albeit somewhat disappointing to those of us who had hoped that this proposal could proceed in this round of amendments.

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2 Members were: Donald S. Affleck, Q.C., Robert D. Anderson, Q.C., Yves Bériault, Sara Blake, Harry Chandler, Rosalie Daly Todd, Calvin S. Goldman, Q.C., Lawson A. W. Hunter, Q.C., George Post, W.T. Stanbury, Norman J. Stewart, Peter Woolford and Ed Ratushny, Q.C. (chair).

3 Because of the different interests involved in telemarketing, we consulted stakeholders drawn from provincial, police, business, financial/credit, advertising and consumer interests separately from the Consultative Panel regarding a draft proposal to address deceptive telemarketing practices.

Nevertheless, some aspects of the Panel's recommendations in the areas of confidentiality and mutual assistance, misleading advertising and price discrimination and promotional allowances raise questions in my mind.

Pre-Merger Notifications

When we looked at areas on which to consult, one area where we identified deficiencies was the pre-merger notification process. The current information requirements are somewhat deficient. The *Act* does not require certain information that would be helpful to facilitate rapid examinations while other information is required that is not relevant to the Bureau's assessment. We must obtain information necessary to conduct an in-depth analysis through voluntary discussions with parties or the use of formal powers, generating delays. When we must seek further information, the prescribed waiting period may expire, even though our examination of the competitive effects of the proposed merger is continuing. Delays are also a drawback for merging parties who wish to proceed with their transactions in a timely manner.

Considering the comments received on the discussion paper[4], the Panel concluded that, rather than significantly changing the pre-merger notification model, as initially proposed in the discussion paper, it would be preferable to retain the positive features of the current system, while addressing those areas that had proven to be problematic.

Working closely with Bureau staff, Panel members devised a new set of information requirements to make notifications more useful to the Bureau while avoiding subjective conclusions by merging parties or placing an undue burden on them. The Panel also recommended longer waiting periods, but not to the extent proposed in the discussion paper, and suggested that the Bureau could still waive these periods. Finally, the Panel recommended that deficiencies in the interim order provision (s. 100) should be corrected to give the Bureau sufficient time to pursue an inquiry under s. 10

In my view, implementing the Panel's recommendations would enhance the effectiveness and efficiency of the merger review process. By vastly improving the Bureau's access to key, relevant information early in the process, this would speed up our review and permit the Bureau to direct resources towards other priority matters. Moreover, the revised waiting periods, although not much longer than they currently are, would more closely approximate the reality of merger review.

Although we would rarely need to use the authority, the improved availability of interim orders would close a loophole in the law, providing added assurance that, in matters where the Bureau has serious concerns, it would have sufficient time to pursue its inquiry.

Regular Price Claims and Section 52(1)(d)

Claims about savings off the regular selling prices of products are a powerful marketing tool. Section 52(1)(*d*) prohibits materially misleading representations to the public concerning the ordinary selling prices of products. It has been the Bureau's long-standing position that the provision requires advertisers to base such claims on the price at which a substantial volume of sales has occurred.

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[4] For a detailed review of comments received on the discussion paper for this and the other issues upon which we consulted, please see the Consultative Panel Report.

When we were considering the areas for amendment on which we should consult, members of the retail industry expressed concern that the existing law lacked sufficient clarity to determine under what circumstances advertisers could make ordinary price claims. They asserted that a significant portion of retailers was unable to comply with the test based on sales volume and that a time-based test was preferable given consumer perceptions. In their view, the current provision discouraged innovative pricing strategies.

Accordingly, we added this subject to the consultation process to determine whether the volume test adequately reflected marketplace reality.

The Panel sought to make the section easier for retailers to understand and apply as well as more reflective of what consumers and retailers understand by "regular" price claims in today's marketplace. It recommended amendments to address misleading price comparisons under a new reviewable misleading advertising matters regime (see discussion below) and suggested two alternative tests. A representation of a former selling price would have to reflect:

- the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place; or

- the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

I am confident that the proposed revision would respond to the concerns of the business community and consumers to have in place a provision that ensures adequate protection for consumers balanced with sufficient pricing flexibility for retailers while, all the while, meeting our desire to ensure fair competition by promoting accurate marketplace information.

Prohibition Orders

Section 34 authorizes the Attorney General to apply to the court for an order prohibiting acts directed toward the continuation or repetition of an offence. However, this authority does not permit prescriptive terms in such orders, requiring positive action to be taken, even when we proceed on consent. Were it to do so, this would be a valuable new alternative means of resolving cases short of prosecution, besides providing an effective means to prevent violations. In the discussion paper, we proposed broadening s. 34 to permit any prescriptive terms that a court agreed would overcome the effects of the anti-competitive practice in question.

The Panel favoured creating a general power to include prescriptive terms in orders where all parties consent. However, with contested proceedings, prescriptive terms should only be directed towards preventing the continuation or repetition of the offence. The Panel was concerned that broader authority could lead to excessively onerous terms.

The Panel also recommended that there be a power to vary, rescind or interpret any order at the request of any party to the order or the Attorney General and was of the view that the *Act* should require the court to specify a time limit for an order, with a maximum statutory time limit of ten years.

In my view, revising what was initially a reasonably broad proposal put forward by the Bureau in the discussion paper, in light of the concerns expressed by commentators and the Panel, would result in a workable and balanced solution to this issue for all concerned. Expanding the scope of possible terms under such orders in line with these recommendations will render this case resolution mechanism more efficacious and provide an alternative to prosecution in some cases.

Deceptive Telemarketing Practices

While telemarketing is a legitimate and valuable marketing tool, its use as an instrument for deception has grown, highlighting the difficulties in pursuing and addressing such matters under the current law. In one joint program, it was estimated that Canadian victims lost well over $60 million last year as a result of such practices, with particularly vulnerable senior citizens bearing the brunt of the deception. Deceptive telemarketing practices also give legitimate telemarketers a "bad name", thereby making telemarketing a less effective promotional tool.

Detecting and preventing deceptive telemarketing is complicated by a number of factors. Deceptive telemarketing operations frequently involve "fly-by-night" companies that, once detected, close down quickly, change corporate identities readily and hide operators' personal assets to avoid seizure. Operators also often shield themselves from potential liability for representations made by their employees.

The United States recently enacted a new *Telemarketing Sales Rule* that addresses, in a comprehensive manner, the most dubious practices. Clearly, if the U.S. effectively polices these practices, deceptive telemarketers will simply train their sights north of the border unless we adopt similarly effective measures. Indeed, the existence of borders is rather meaningless when it comes to the ability of deceptive telemarketers to exploit Canadian consumers. Accordingly, we concluded that this kind of focused attack warranted consideration.[5]

Although the Panel acknowledged that deceptive telemarketing is a serious problem, it did not consider that it was able to make detailed recommendations for reform in this area. Nevertheless, it recognized the merit of furthering public debate and discussion of this issue, and concluded that it would be helpful to include in its Report a draft legislative proposal developed by the Bureau. Its main elements are:

- creating a new criminal offence involving deceptive telemarketing schemes that fail to disclose relevant information or involve advance payments;
- expanding liability for those operating or participating in such schemes regarding the actions of their agents or employees; and
- improving the availability of interim injunctions under s. 33.

Implementing a proposal along these lines would reduce the number of Canadian consumers victimized by deceptive telemarketing practices. It would also enhance the effectiveness of telemarketing as a means of promoting legitimate business interests. Yet, any amendments to the

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[5] Participants in the focus group discussion of this subject generally recognized that deceptive telemarketing is a problem that has not been pursued very vigorously by prosecutors under the *Criminal Code*. A more focused approach under the *Competition Act* was both necessary and timely, although amendments to the *Act* could not, in and of themselves, solve the problem. Participants expressed general support for a proposed legislative approach but also suggested refinements. A summary of the focus group discussions was provided to the Panel for its consideration.

Act would only be part of the solution to this problem. Many agencies and levels of government are involved in addressing different dimensions of the issue. So, even these amendments wouldn't eliminate this deception. Cooperation with other law enforcement agencies, both inside and outside Canada, the Provinces and the private sector in educational and law enforcement efforts must continue.

Confidentiality and Mutual Assistance in Enforcing Competition Laws

Background -- The Changing Landscape

During its investigations, the Bureau collects information from a variety of sources to provide a picture of the state of competition in a particular industry. Information typically includes historical and projected data on sales, profits and market shares, statements of competitive strategy, confidential contracts with customers and suppliers, detailed information on costs of production, and analyses of the competitive impact of firms and products on the market in question. This information is often commercially sensitive and although, more often than not, parties provide it on a voluntary basis, the Director may also obtain it by using formal powers under the *Act*. However, the *Act* does not protect the confidentiality of information provided voluntarily.

Currently, s. 29 of the *Act* prohibits communicating specified information -- generally, the names of complainants and information provided to the Bureau under compulsion -- except for the purposes of the administration or enforcement of the *Act* or to a Canadian law enforcement agency. The Bureau can disclose such information, including to its foreign counterparts, in relation to Canadian, or joint Canadian/foreign, investigations pursuant to the "administration or enforcement" exception. While rare, it is occasionally necessary for the Bureau to communicate confidential information outside the Bureau to advance an investigation. However, we decide whether to communicate information by balancing its commercial sensitivity (e.g. information about a price fixing conspiracy, while no doubt potentially damaging to a target, is not likely to be commercially sensitive) with the availability of alternative means to obtain the required information in return.

Since the mid 1980s, a number of trends have affected Canadian public policy regarding the enforcement of foreign competition laws. Against the enactment of blocking statutes in Canada to prevent the extraterritorial application of foreign laws, there has been a more recent countervailing trend (e.g. the *Mutual Legal Assistance Treaty* and enabling legislation). Globalization and the freer trade environment in North America have increased the frequency with which competition law offences, and investigations, cross national boundaries. This has heightened the need for cooperation and information-sharing among investigative agencies to ensure effective Canadian competition law enforcement. The need to cooperate also flows from the necessity to avoid situations where the parties under investigation would seek to play one antitrust agency against another during the negotiation process.

There are no territorial limits to cartel discussions around boardrooms. The evidence clearly supports the fact that there is a need for increased cooperation. For example, over the last year, there has been a significant increase in the number of requests for assistance sent by the Bureau to foreign antitrust agencies and *vice versa*. Responding to such requests involves providing public information (or confidential information, where permitted) on matters that are before the courts or the Tribunal or under investigation, or information on whether the Bureau is

investigating, or has investigated, specific anti-competitive behaviour, a particular company or a particular industry.

Because there has been a significant increase in the number of mergers that have transborder effects, or that are taking place in more than one jurisdiction, contacts with foreign antitrust agencies (often with parties' consent) are taking place more and more frequently. We establish these contacts to exchange views on generic issues, such as the theory of the case, market definition or the structure of the industry. Historically, these contacts were established almost exclusively with the United States' Federal Trade Commission and the U.S. Department of Justice. However, over the last year, we have seen a significant increase in the number of mergers that are reviewed by three jurisdictions concurrently: Canada, the U.S. and the European Commission. Thus, our contacts with the EC have increased.

Canada and the United States have had a relationship of cooperation of many years' standing. In 1995, a 1984 Memorandum of Understanding between Canada and the United States, which focused on avoiding conflicts, was updated and now provides a framework for closer collaboration in the enforcement of our competition and deceptive marketing practices laws. It provides for improved and expanded notification, consultation and cooperation that will minimize disputes between antitrust authorities. It also commits the two governments to more extensive cooperation in the enforcement of laws governing competition and deceptive marketing practices. In announcing that he had signed the agreement with his U.S. counterparts, Minister Manley emphasized:

> Effective enforcement of the *Competition Act* is essential to promotin g Canada's economic welfare in today's global economy... Increasing trade between Canada and the United States benefits Canadian consumers and businesses. Closer cooperation between our two countries' competition authorities is essential to ensure that cross-border anticompetitive activities do not impair those benefits.[6]

We are currently negotiating a similar agreement with the European Union.

There have also been joint investigations between the Bureau and the Antitrust Division of the U.S. Department of Justice, resulting in enforcement action in both jurisdictions that would not otherwise have occurred.

A recent case that illustrates this growing cooperation involved Canada Pipe Company Limited and U.S. Pipe and Foundry Company. Canada Pipe pleaded guilty to conspiring with U.S. Pipe to have the latter exit the Canadian market for ductile iron pipe. We received extensive cooperation from the U.S. Department of Justice. Open discussion and the exchange of information were vital to the successful resolution of the case. The court imposed a record $2.5 million fine.[7]

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7 News Release, "Industry Minister Manley Signs Canada - U.S. Competition Policy Agreement", August 3, 1995.

8 In his decision rendered on September 27, 1995, Mr. Justice McKeown of the Federal Court (Trial Division) reasoned that the level of the fine should be high enough to deter persons outside Canada from engaging in activities that violate the *Act*. He stated that the fine levied in Canada should be significant enough to be meaningful to foreign conspirators. Targeting the Canadian market should not be cheaper than targeting the U.S. market.

The thermal facsimile paper case provides a second example of international cooperation, involving a joint investigation between the Bureau and the Antitrust Division of the U.S. Department of Justice. On July 12, 1994, Kanzaki Specialty Papers Inc., a U.S. company, pleaded guilty in the Federal Court of Canada to price fixing and was fined $950k. On August 5, 1994, the court fined Mitsubishi Corporation, of Tokyo, Japan, and its Canadian subsidiary, Mitsubishi Canada Limited, $950k after they entered guilty pleas to price fixing. On December 18, 1995, Rittenhouse Ribbons & Rolls Ltd. was fined $98k following a guilty plea under s. 61 (6) to price maintenance. Concurrently, fines have also been imposed in the U.S. This case is still ongoing.

Confidentiality and international cooperation are central to the amendments initiative for a number of reasons:

- there is a divergence of views in the legal and business communities on the current authority of the Director to communicate information to third parties and foreign antitrust agencies to advance investigations under the *Act*;

- safeguards for confidential information that is communicated to foreign antitrust agencies have been sought by the Director and the business and legal communities;

- there is currently no statutory protection for confidential information provided voluntarily to the Director; and

- while the *Mutual Legal Assistance Treaty* and enabling legislation provide authority to engage in mutual assistance in respect of criminal competition law matters, no similar authority exists in respect of civil competition law matters, nor can the Director use the *Act's* formal powers to assist foreign competition authorities.

The Director needs the authority to seek formal powers where a Canadian competition investigation is not involved because doing so would be the *quid pro quo* for our being able to ask our foreign counterparts to obtain evidence located in their jurisdiction for use in Canadian proceedings. The Americans recognized that reciprocal assistance was the key in enacting their *International Antitrust Enforcement Assistance Act* in 1994.

For the most part, we agree with the Panel's recommendations on confidentiality and mutual assistance. However, I have some comments on certain details that I would like to make.

Scope of Confidentiality Protection

Given the commercial sensitivity of information obtained by the Bureau as well as personal privacy interests, we agree that statutory confidentiality protection should be extended to include all information obtained (both voluntarily and through compulsory powers) by the Director in the administration or enforcement of the *Act* unless it is public. This would simply codify current Bureau practice. We also agree with the Panel's proposal that this protection be backed up by a specific offence in the *Act*. However, a party providing information should be able to waive confidential treatment without the Bureau being obliged to seek the consent of other parties "directly affected", as the Panel has recommended.

Authorized Communications

A list of permitted communications ought to appear in the *Act*. Moreover, we agree with the views expressed by some members of the Panel that the Director must have a discretion to communicate information to advance an investigation under the *Act* (for example, to Canadian marketplace participants or to foreign competition law authorities[8]). It is perhaps trite to say that the Director must have adequate statutory authority to administer and enforce the *Act* effectively.

When the *Act* is enforced, the Director's duty is, simply put, to gather, distill and present information -- and to do so in a responsible manner. The Bureau has a proven track record of treating confidential information responsibly. As a law enforcement official, given the myriad situations with which the Bureau deals on a daily basis, the Director's authority must be sufficiently flexible to respond to changing circumstances -- the ebbs and flows of an investigation -- without being unduly restricted in how those duties are executed.

International Mutual Assistance

The Panel made a number of recommendations regarding the circumstances under which international mutual assistance should occur and how foreign authorities may use information sent to them. Adopting these recommendations will, we believe, ensure that, whenever information is communicated to a foreign competition law authority, this will occur only when it is in the Canadian public interest and that information will be subject to safeguards which are adequate to protect its confidentiality. Such prerequisites are both necessary and welcome, in our view.

Where information sharing relates to a foreign competition law matter alone, we also agree with the Panel's view that we should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)*. This would involve approval by the Minister of Justice of requests for assistance received from foreign competition law authorities and judicial authorization to send information obtained to a foreign jurisdiction. (Of course, where requests are in relation to criminal matters, *MLACMA*, and not the new *Competition Act* mutual assistance provisions, would continue to apply.)

Contrary to the Panel's recommendation, however, I have concluded that we shall not seek such authorization in respect of information provided voluntarily to the Bureau. Businesses can continue to be confident that information they provide to the Bureau in relation to a Canadian investigation will not end up being sent to a foreign jurisdiction for the purposes of an unrelated foreign investigation. Whether we send such information to a foreign agency in this context will be up to the information provider alone. Absent consent, if a foreign agency still wants the information, it will have to ask us to invoke formal process to obtain the information again on an involuntary basis.

I also believe the authority to apply to send information to a foreign jurisdiction in relation to a solely foreign matter in the absence of a request from that jurisdiction is not necessary at this time. As a result of this change in approach from the Panel's broader recommendation, parties

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[9] Information in the latter case would be communicated within the context of a mutual assistance agreement, with applicable safeguards, as discussed below.

would be able to remain confident that the information they provide will only be used for the purposes for which it was obtained.

We also agree with some members of the Panel who asserted that notice of such judicial proceedings should not be provided to the targets of investigations as well as information providers -- the process set out in *MLACMA* (notice to providers of information only) is adequate.

Panel members had divergent views on the issue of an oversight mechanism in relation to Canadian, or joint Canadian/foreign, investigations. Requiring the Director to go to court to seek authorization every time there is a need to communicate information to a foreign agency to advance a Canadian investigation would provide little guarantee of additional protection. Such a prerequisite goes beyond current protections in other areas of law enforcement. It would be hard to argue that the sensitivity of this type of information is so qualitatively different that it warrants greater protection than that provided to, say, information obtained by Revenue Canada or securities regulators. The availability of hearings would serve to hinder the investigative process.

History has shown that those who have held the position of Director are acutely sensitive to confidentiality concerns, as is the Bureau as an institution. As stated earlier, the Bureau has a proven track record of preserving the confidentiality of information provided to it, as do our counterparts in the U.S. Their confidentiality protections are unassailable. Any assertion that a foreign government will not live up to its international obligations in this regard is simply speculation.

In conclusion, a confidentiality and mutual assistance regime with the attributes I have just outlined would strike a reasonable balance between the concerns of the business community that there be a proper framework to protect confidential information and the Director's mandate to enforce the *Act* for the benefit of all Canadians -- fairly balancing private and public interests. It would build on an existing framework for criminal matters that has worked well, would provide required flexibility and would result in better access to evidence located in other jurisdictions.

Misleading Advertising and Deceptive Marketing Practices

Two Adjudicative Regimes -- Criminal and Civil

As you know, the current system for adjudicating misleading advertising and deceptive marketing practices cases relies exclusively on the criminal process. There have been continuing calls to provide a non-criminal adjudicative alternative and improved remedies since the provisions were last substantially amended in 1976.

The Panel supported creating an alternative civil regime. Recourse to an adjudicator other than the criminal courts would have a number of advantages, including: fast and efficient remedial action; avoidance of a criminal stigma; in the case of the Tribunal, an ability to develop expertise in adjudicating such matters; and better use of Bureau resources.

It would be necessary to retain a general criminal prohibition, similar to s. 52(1)(*a*) to address serious cases of deception. However, the Panel recommended that the provision should require subjective *mens rea* or recklessness.

The Panel had its views on where to draw the line between the civil and criminal regimes. Most members saw only those cases that amounted to near-fraud as warranting a criminal response. However, we have to ensure that the criminal regime we establish will provide adequate incentive to deter breaches of the law. How should we address, for example, the case of a large corporation with diffuse lines of executive responsibility that constantly, negligently publishes misleading ads covering a diverse range of goods and representations? The criminal option must be an available response for repeatedly negligent advertisers.

It has been and continues to be the Bureau's view that there must be a reasonably available criminal backstop if the civil process fails to ensure advertisers exercise due care. An objective *mens rea* test would achieve the right balance. In my view, if someone has made a materially deceptive or misleading representation and knew or ought to have known the true facts, this would be an adequate mental standard.

The New Civil Regime

Under the civil regime, the existing misleading advertising provisions except ss. 55 and 55.1 (the multi-level marketing and pyramid selling provisions) would be enacted as reviewable matters under Part VIII of the *Act*. The main remedy available from the adjudicator would be cease and desist orders. The Panel also recommended interim cease and desist orders, to be available on notice in urgent situations on the same standard as interim injunctions and of limited maximum duration to ensure the Director proceeds expeditiously.

Because orders that go further than merely requiring a party to cease and desist are potentially burdensome, the Panel concluded that they should only be available if the advertiser fails to establish that it exercised due diligence.

The Panel was concerned about the appropriateness and efficacy of restitution orders and orders directed towards improving the general quality of marketplace information, both of which had been proposed in the discussion paper. To encourage businesses to exercise due care to avoid making misleading or deceptive representations, the Panel concluded that monetary penalties should be available under the civil regime. Such penalties would be available to encourage compliance with the *Act* in the future, rather than to punish for past practices.

The Panel also endorsed orders requiring the publication of notices to inform marketplace participants about impugned practices. The current practice in the Bureau's alternative case resolution program regarding notices' format, size and duration should be replicated in the *Act*.

The Choice Between Adjudication Regimes

Finally, on the subject of misleading advertising, I would like to address the issue of the decision to choose between adjudication regimes. This issue was first vigourously debated by the Ratushny Working Group on misleading advertising reform in 1990 and it arose again in the comments on the discussion paper and during the Consultative Panel's deliberations.

While the choice of one adjudication route would foreclose the other, some stakeholders believed there was a potential for abuse of the Director's discretion to elect between regimes in taking enforcement action (i.e. deciding whether to make an application under the civil regime or refer evidence to the Attorney General with a recommendation for prosecution). In the end, the Panel

rightly decided that no statutory conditions or time-limits should be adopted regarding this decision.[9]

Concerns about the overlap between the civil and criminal regimes have been expressed in several ways. In my view they are overstated, and I would like to take a few minutes to address them.

First, some have argued that parties will not know in advance whether the Bureau will pursue criminal or civil adjudication. However, parties will be in a better position than the Director to assess whether their actions meet the criteria necessary for them to be subject to criminal prosecution. Right now, they don't know whether a criminal prosecution will occur, a prohibition order will be sought on a contested basis or an alternative case resolution will be permitted. Yet, there has been no similar call for criteria to be p laced in the *Act* in light of current practice.

In any event, recall that the area of overlap where the Director will be faced with a decision is where there is adequate evidence available to recommend prosecution to the Attorney General but, instead, the Director opts for the civil regime -- a much less severe resolution. If stakeholders want to avoid arbitrariness, the Bureau could ensure this is not an issue by opting to recommend prosecution every time, notwithstanding any arguments that the facts support a less severe resolution. However, many advertisers and their counsel would clearly not want this result.

Second, some have argued that creating an alternative civil regime might lead to situations where advertisers cooperate and provide information, hoping to convince the Director that the impugned practices are appropriate for a resolution short of criminal prosecution but, instead, the Director uses that information against them in subsequent criminal proceedings. However, it is entirely within the control of the party under inquiry and its counsel to decide (absent a s. 11 or s. 15 order) to provide information to the Director in hopes of resolving a matter. Counsel can protect advertisers from the information being used against them by seeking "without prejudice" discussions with the Director's staff.

In addition, the alternative case resolution program has existed for some eight years. The Bureau does not abuse such alternative resolution mechanisms by obtaining additional information to be used as evidence in criminal prosecutions. The ACR program is an apt analogy to the proposal in the sense that a less severe alternative means to resolve a case is available.

Third, some are concerned that the option of criminal prosecution may be a threat (perceived or real) to induce a settlement in civil cases. However, the Director's decision is not unfettered between the two regimes -- the evidence either exists to prosecute or it doesn't. Moreover, the decision to commence a criminal prosecution is not the Director's -- it is that of the Attorney General. Since fiscal 1989-90, the Attorney General has concluded that prosecution was not warranted in respect of 37 matters that were formally referred by the Director. Clearly, the Director does not have the final decision in this respect.

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10 However, the Panel concluded that it would be desirable for the Bureau to publish, and seek public input on, guidelines indicating the basis on which the decision will be made to proceed criminally or civilly and that every effort should be made to indicate a decision to parties under inquiry within 90 days of first contact.

Price Discrimination and Promotional Allowances

The prohibition against price discrimination contained in s. 50(1)(*a*) applies when a supplier grants price concessions to one purchaser that are not available to competing purchasers in respect of a sale of articles of like quality and quantity. This provision was enacted in 1935 to protect small, independent retailers from unfair discrimination flowing from the exertion of buying power by large buyers.

Section 51, the promotional allowances provision, which was enacted some 20 years later, prohibits granting allowances for advertising or display purposes that are not offered on proportionate terms to competing purchasers.

It has been our view that a narrow reading of these prohibitions is out of step with the rest of the *Act* and current economic thinking. They focus on the impact on individual competitors, rather than the overall level of competition and can deny businesses greater, potentially pro-competitive pricing flexibility. Moreover, the enactment of the reviewable matters provisions permits potential competition issues arising from relationships between customers and suppliers to be addressed where such behaviour has resulted in a substantial lessening of competition. Despite the issuance of detailed enforcement guidelines in 1992 that seek to ameliorate the negative effects of a broad interpretation of these provisions, it is alleged that the threat of private actions still chills price behaviour that would be benign or even pro-competitive.

The Panel recommended that the price discrimination and promotional allowances provisions be repealed. Criminal prohibitions and sanctions are inappropriate tools to deal with these types of behaviour. The Panel considered including a specific civil provision for price discrimination and promotional allowances but concluded that the reviewable matters provisions, particularly the abuse of dominant position provision (s. 79), are broad and flexible enough to deal with price discrimination so that no new provisions need be created.

The Panel considered the concerns of some elements of the small business sector that placed reliance on these provisions. The Panel found the benefit to those businesses to be overstated -- more a matter of perceived, than real, benefit. The existing provisions do not prevent suppliers from granting discounts or rebates to purchasers who buy more products, and so have done very little to protect small retailers from the exertion of buying power by large buyers. Rather, they have had the perverse effect of discriminating against dynamic small businesses by permitting suppliers to make price concessions solely based on volume.

While I see merit in the Panel recommendation, I take seriously the arguments asserted by a number of members of the small business sector that the existence of these prohibitions ensures that suppliers treat them fairly. Accordingly, I believe we should continue to study and discuss the consequences of repeal to help us confirm whether the facts support their argument. Without such confirmation, we should not include such a repeal in the current amendments initiative. In the meantime, we will continue with our current enforcement policy expressed in the 1992 enforcement guidelines.

Access to the Competition Tribunal

Currently, only the Director may launch proceedings before the Competition Tribunal in respect of all reviewable matters except specialization agreements. Private parties cannot initiate proceedings to obtain a remedy from the Tribunal in cases where the Director does not act.

Given the scope of business activity that is subject to the *Act*, it is difficult for the Director to investigate and pursue all seemingly meritorious complaints, leaving some aggrieved parties with no effective remedy. Amendments could allow parties aggrieved by alleged violations of the reviewable matters provisions to initiate proceedings, seeking the remedial orders currently available under the *Act*. However, we must balance facilitating the pursuit of private remedies against the potential to use litigation as an instrument of strategic behaviour, or as a means of pursuing objectives inconsistent with the promotion or maintenance of competition.

The Panel discussed whether the need for private litigation before the Tribunal had been established. The issue of access to the Tribunal by private parties raised considerable controversy and concern among some stakeholders. Regardless of the merits of any proposal that might be put forward, the Panel thought that a reasonable period of public discussion of issues associated with private access to the Tribunal was required to develop a level of understanding necessary to address these concerns. Because the Panel felt that this issue required detailed analysis to understand its implications fully, it recommended that a thorough review and analysis be conducted by the Bureau.

I am pleased that the Panel did not dismiss outright the possibility of access to the Tribunal by private parties. I continue to believe that a reasonable private access regime can be crafted that would provide a valuable means of recourse without encouraging strategic litigation for competitive reasons.

The Panel's recommendation reflects a responsible approach to an issue that, in my view, we must eventually address head-on. We have already taken steps towards fostering a debate on this subject.

The Bureau has commissioned a comprehensive study of the case for private enforcement of the reviewable matters provisions of the *Act* and the principal considerations that should shape such a regime. In the coming weeks, I hope to release the study to spur further discussion. However, from my preliminary review of the work underway, I can indicate that the case for private enforcement is quite strong. While there are, admittedly, difficulties associated with private access, foremost among them the thorny issues of over-deterrence and strategic behaviour, the authors' preliminary view is that these are arguments for careful management of such proceedings, rather than abandonment of the principle.

I take seriously the Panel's challenge to "make our case" and you may expect that, if access is omitted from the amendments initiative, it will resurface in the next round. I am concerned that the U.S. model is overwhelming the debate. We must look elsewhere to develop a model that is best for Canada. I am confident that informed public debate will eventually allow the development of an approach to private enforcement that meets the legitimate concerns of all stakeholders.

Additional Amendments

The Panel recommended making several minor amendments to the *Act*, one of which I would like to address today. Section 125 authorizes the Director to make representations to federal boards, commissions or other tribunals in respect of competition whenever such representations are relevant. However, this authority does not provide the Director with access to confidential documentation filed with these bodies. This can undermine the effectiveness of the Bureau's representations. Accordingly, the Panel recommended that s. 125 be amended to provide the Director with the right to gain access to the confidential documentation filed with a federal board, commission or other tribunal.

I take my authority under s. 125 very seriously. However, other government initiatives are currently under way that may address these concerns through amendments to the evidentiary provisions of the legislation of the bodies in question, rather than the *Act*.

Conclusion

The completion of the Consultative Panel's report is an important milestone in developing a package of amendments aimed at improving the efficiency and effectiveness of the *Competition Act*. The Panel has produced a valuable report that provides an excellent basis for an informed consideration of amendments to the *Act*. It is a fine example of how the public and private sectors can cooperate on improving one of Canada's key framework laws.

The Panel's recommendations have been the subject of intensive consideration by my office. Today, I have flagged a few departures from the Report. I believe they are sound and do not fundamentally change the overall balance and even-handedness of the proposed package of amendments.

In the February 1996, Speech from the Throne, the Government declared that it would introduce proposals to strengthen the economic framework with legislative improvements in the competition law area, among others, to promote a proper climate for economic growth and jobs. It is now well situated to deliver on that promise.

DECEPTIVE TELEMARKETING
REVISED LEGISLATIVE PROPOSAL OF THE COMPETITION BUREAU

Following the focus group discussion on deceptive telemarketing held on January 15, 1996, the CB reviewed the comments received from focus group participants and other sources and drafted a revised legislative proposal. The revised proposal builds upon a text that was discussed at the focus group meeting, but differs from that earlier text in several respects.

1) A new legislative provision would be added to the *Competition Act* to provide a criminal prohibition against participating in or operating a scheme of deceptive telemarketing.

2) The provision would apply to the use of one or more telephone calls, including situations where telephone calls are combined with other forms of communication. The provisions would encompass both out-bound calls (those calls initiated by the telemarketer) and in-bound calls (those initiated by a prospective purchaser).

3) For the purposes of this provision, a scheme of deceptive telemarketing would be defined as a scheme for the sale of products or the promotion of a business interest, or that is purported to be for this purpose, where representations are made by means of one or more telephone calls, or a combination of telephone calls and other forms of communication, and,

   (a) the representations are false or misleading in a material respect, or
   (b) the representations relate to a prize promotion, and the telemarketer requests or requires the payment of any consideration as a condition of receiving the prize in advance of delivery of the prize, or fails to comply with section 59 of this *Act*, or
   (c) the representations relate to a premium offer and the telemarketer fails to adequately and fairly disclose the approximate fair market value of the premium and the terms upon which the premium will be provided, or
   (d) payment of any consideration is required in relation to the sale of a product in advance of delivery, where the product is offered for sale at a price that is substantially inflated, having regard to the fair market value of the product.

4) For the purpose of sub-section (a), a representation shall be deemed to be false or misleading where there is not fair, reasonable and timely disclosure of the true identity of the seller, the type of product being sold, the total cost of the product to the consumer, and any material restrictions or terms applicable to the purchase of the product. For greater certainty, it would be specified that the disclosure obligations cannot be fulfilled through false disclosures.

5) In determining fair, reasonable and timely disclosure, the court shall consider the characteristics of the audience to whom the call is directed and the manner in which the information is conveyed.

6) Exemptions to the timely disclosure requirement as described in 4) should be identified to eliminate the obligation in circumstances where it could be burdensome or disproportionate, such as:

- in the case of telephone calls initiated by the prospective purchaser, in response to written promotional materials, where such disclosure was clearly and conspicuously made in any media within a reasonably proximate period of time; or

- in cases where it would be reasonable to presume that the purchaser would already know this information through a pattern of previous purchases from the same seller or telemarketer, provided the purchases were made at fair market value upon reasonable commercial terms, and the information is supplied upon the purchaser's request.

7) To address the problem of deceptive telemarketing scheme owners or operators shielding themselves from potential liability for the representations made by their employees or agents, anyone operating or participating in a scheme of telemarketing would be required to ensure that actions by agents or employees conform to the requirements of the legislation.

8) Deceptive telemarketing would be a strict liability, criminal offence. A party could avoid responsibility for violations under the law provided that it could establish taking reasonable precautions and exercising due diligence to ensure that the law was complied with. In other words, provided telemarketers (whether sellers, owners, or operators) took reasonable steps to ensure that the required disclosures were made, the prohibition on advance payments was complied with, etc., they would not be liable.

9) Deceptive telemarketing would be an offence where the Attorney General may proceed by way of summary conviction in less serious matters, or on indictment in more serious matters. However, to provide more effective deterrence, the maximum fine available upon summary conviction would be increased from twenty-five thousand dollars to two hundred thousand dollars.

10) To further assist in obtaining penalties which would be appropriate to deter deceptive telemarketing practices, a non-exhaustive list of factors would be developed to be considered in relation to the sentencing of such offences. Appropriate aggravating factors might include: 1) the use of lists of frequent purchasers; 2) the intentional targeting of particularly vulnerable persons; 3) the amount of ill-gotten gains; 4) the repetition of telemarketing offences; 5) the use of harassing or abusive tactics; and, 6) the use of unauthorized charges or payments. These factors should be used as enforcement guidelines relied upon by the Bureau in developing sentencing recommendations for the Attorney General.

11) Deceptive telemarketing can cause considerable harm to the marketplace in a short period of time. Although a criminal offence provision is an appropriate means of deterring such conduct and punishing offenders, there are nonetheless cases where it would be desirable to be able to halt the offending conduct pending disposition of the

criminal case before the courts. Consideration would be given to amending the interim injunction provision in section 33 of the *Act* to provide adequate access to such an order in the case of telemarketing. In addition, consideration would be given to extending the interim injunction in a manner to compel third party suppliers to withhold service from an identified corporation or individual for a specific period of time in circumstances where the service is being used principally for the conduct of a deceptive telemarketing scheme, and the likelihood of public harm is part icularly strong. This might be appropriate, for example, in cases of repeat offenders.